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518.4.19.
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SECOND POSTSCRIPT

TO A LATE

P A M P H L E T,

ENTITLED,

A LETTER to Mr. ALMON,
IN MATTER OF LIBEL.

By the AUTHOR of that LETTER.

And thus was fulfilled the LAW and the PROPHETS.

L O N D O N:

Printed for J. MILLER, in QUEEN'S-HEAD-PASSAGE,
PATER-NOSTER-ROW, 1770.

Price One Shilling.

Nov. 25, 1770.

SINCE a foregoing publication, there has been printed in the *Gazetteer*, of Friday last, the unanimous judgment of the Court of King's-Bench, in the *King against Woodfall*, which occasions my adding this postscript *.

As

* *The unanimous judgment of the Court of King's-Bench, in the case of the King against Woodfall, as delivered by Lord Mansfield, Tuesday, Nov. 20, 1770; copied from the Gazetteer.*

This matter comes on before the Court upon two rules; which have been obtained; the one by the defendant's counsel, *to stay the entering up the interlocutory judgment in this cause*; the other by the Attorney-General, *to enter up the judgment according to the legal import of the verdict*. In considering these rules, we are naturally led to begin with the last, because the last may decide the former; and in doing this, it will be previously necessary to state a report of the trial. "The defendant was tried for the *printing and publishing*, in a paper called the PUBLIC ADVERTISER, a libel signed JUNIUS; and in the information the tenor of the libel was set forth, with *innuendos*, to complete the blanks, and with the usual epithets. (1.) The first witness, Crowder, proved the buying of the paper, which was produced, and twelve others, at the defendant's printing-house, of his servant. (2.) Harris proved

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payments

As I take it, the question before the public, is not whether the Court can or cannot arrest judgment, in case the Jury find a de-

payments at the Stamp-office, by the defendant, for the Public Advertiser, and that the duty for the stamp upon this paper was paid by the defendant's servant. (3.) Lee, Sir John Fielding's clerk, proved several payments to the defendant for advertisements in the Public Advertiser, and produced his receipt." The proof upon the trial was clear, and not controverted by the defendant's council, who called no witnesses. They rested their defence in objecting to some of the *innuendos*, but principally applied to the Jury to convince them, that the paper was innocent, and that some of the epithets in the information, did not apply to the intention of the defendant. No fact, in case the paper be innocent, can make the publication a subject of guilt; and if the Jury find it so, the defendant may have advantage of its innocence by arrest of judgment in this Court; but that is not any question here. Nor is this a case, like some of those, where a publication of a paper may be justified, from particular circumstances. I directed the Jury, that if they believed the *innuendos*, as to persons and things, to have been properly filled up in the information, and to be the true meaning of the paper, and if they gave credit to the witnesses, they must find the defendant guilty; for, if they believed them, there is no doubt but there was sufficient evidence of the defendant's printing and publishing. If the Jury were obliged to determine, whether the paper was in law a libel, or no, or to judge whether it was criminal, or to what degree, or if they were to require proofs of a criminal intention, then this direction was wrong. I told them, as I have always done before, that whether a libel or not, was a mere question of law, arising out of the record; and that all the epithets inserted in the information, were also formal inferences of law. A general verdict of the Jury, finds only what the law implies from the fact. There is no necessary proof of malice to be made; for that is scarce possible to be produced. The law implies, from the fact of publication, a criminal intent. The Jury stayed out a long while—many hours—and at last delivered in their verdict at my house (the objection to its being out of the city being cured by consent.)—To the usual question of the officer, the foreman answered in these words, *Guilty of printing and publishing only*. The officer has entered up the words literally, without so much as adding the usual words of reference to connect the sense. An affidavit of one of the Jury has been attempted to be laid before

a defendant guilty, where, in the opinion of such Court, the publication is innocent; nor whether the Jury are *obliged*, but whether

before the Court by the defendant's council; but we are all of opinion that it cannot be received.—Such affidavit can only be admitted in motion for a new trial, where there is a doubt upon the words in which the verdict was delivered, or upon the Judge's notes of the evidence: but an affidavit of a Jurymen cannot be admitted to explain or assert, what he thought, or intended, at the time of giving in the verdict. The motion of the Attorney-General divides itself into two parts; (1.) the first, to fill up the finding of the Jury, with the usual words of reference, so as to connect the verdict with the information. The omission of these words, we are of opinion, is a technical mistake of the clerk, and may be now supplied. (2.) The second head of argument, is to omit the word *only* in the entry of the verdict. This we are all of opinion cannot be done; the word *only* must stand in the verdict. No reason can be urged for omitting the word *only*, but what goes to prove that it adds nothing to the sense of the verdict. If this word was omitted, the verdict would then be, *guilty of printing and publishing*, which is a general verdict of *guilty*; for there is no other charge in the information, but printing and publishing, and that alone the Jury had to enquire. In the case of the *King and Williams*, for the North Briton, the Jury found the defendant *guilty of printing and publishing*. The officer entered up the verdict *guilty* generally: the defendant received the sentence of this Court, and no objection was taken by his council. Where there are more charges in an information than one, the finding the defendant guilty of *printing and publishing only*, would be an acquittal of the other charges; but here the Jury had nothing else to find. They found him *guilty of printing and publishing only*, which was all of which they were to find him guilty, being the only crime with which he was charged. We are all of opinion, that my *direction to the Jury* is right, and according to law; the positions contained in it never were doubted; it never has been, nor is it now complained of, in this Court. There clearly can be no judgment of acquittal, because the fact found by the Jury, is the only question they had to try. The single doubt that remains, is as to the meaning of the word *only*. It would be improper now to make a question of the law, as I lay it down. In all the reports which I have made upon trials for libels, where my direction has been uniformly the same, the bar may remember the dead, and the living who are now

whether they are competent, and by the constitution, empowered to judge concerning the malice or innocence of such publication. It is not necessary here to enquire, or to distinguish, whether this be a point of law or a matter of fact, but whether it be submitted to the judgment of the Jury, be it one or the other, or a mixture of both. However, I have already explicitly declared my opinion, that it is merely a matter of fact, and am so convinced of my being right, that I should not be afraid to meet the twelve Judges upon it. If it be not within the province of the Jury to judge of the malice, why do all Judges permit the council for the Crown, to offer reasons to Jurors, to induce them to believe the publication a libel : and, on the other hand, suffer the defendant's council

absent, all to have concurred in agreeing, that it was law thus to direct the Jury in matter of libel. Taking then the law to be thus, the only question is, whether any meaning, which will affect the verdict, can be put upon the word *only*, as it stands upon this record. If the Jury meant to say, they did not find the paper a libel, or the intent of the defendant to be criminal in publishing it, or that they did not find the truth and application of the epithets in the information, all this would have vitiated the verdict ; for it would have been entering into matters not before them. But if they meant to say, that they did not find the meaning put upon the *innuendos*, we should enter up judgment of acquittal ; but this would be contradictory to the former part of their verdict. It is impossible to say with certainty, what they meant. Possibly they meant differently, and some of them might intend not to find the whole sense put upon the *innuendos*. This would be the most favourable supposition for the defendant, to which the Judges will always lean. But if a doubt arises on the import of the verdict, the Court should grant a *venire facias de novo*, which is in their power to do, when a verdict of acquittal has not been found for the defendant.

council to argue for its innocency? Can this have been immemorially, and still continue to be the constant practice, and yet *the Jury have nothing to do with it*. To my astonishment, I find it asserted, in this very special and long considered judgment in the *King against Woodfall*, that Lord Mansfield's direction and positions to the contrary, have been agreed, both by the living and the dead, to be law, and that they were *never doubted*; and yet, it has been formerly allowed, that *the Jury might, at their peril, take this upon them*. The celebrated and unanswerable treatise of Solicitor-General *Hawles*, must too, go for nothing, because it is written expressly against such direction and positions, and is in every body's hands. Not many years ago, *Pratt*, Attorney-General, in moving before this *British* Chief Justice, for leave to file an information against Dr. *Shebbeare* for a libel, publicly said, and was not contradicted; "it is merely to put the matter in a way of trial, for I admit, and his Lordship well knows, that the Jury are judges of the law as well as the fact, and have an undoubted right to consider, whether, upon the whole, the pamphlet in question be or be not published with a wicked, seditious intent, and be or not a false, malicious, and scandalous libel." And, as I have been informed, upon the trial of the Doctor, Mr. Attorney applied himself wholly to the Jury; told them, *they* were to judge whether the defendant was guilty of a crime or not by his

publication, and never addressed himself at all to the Judge; and that his Lordship never directed them to consider the publication, nor let them know, that their doing so, would vitiate their verdict, nor that the intent and criminality of the writing were not before them. The country were satisfied with the conduct of council and Judge, thought the Doctor to be a libeller, and found him guilty. Every body is acquainted with *Lilburn's* case, and that of *Penn* and *Mead*. At the trial of the seven Bishops, for composing and publishing a false, pernicious, and seditious libel, in contempt of the King, &c. all the Judges, and the council of both sides, entered into arguments, either to convince the Jury; that the Bishops petition was a libel, or that it was not. Sir *Robert Sawyer*, (who had been Attorney-General) contended, " that both the falsity of it, and that it was " malicious and seditious, were all matters of " fact to be proved," and made this the first head of his speech to the Jury. Mr. *Finch*, in following him, said, " If you, gentlemen, " should think, that there is evidence to " prove the delivery by the Bishops, of the " paper set forth in the information, yet, " unless their presenting it to the King in " private, may be said to be a malicious and " seditious libel, with an intent to stir up " the people to sedition, and to diminish the " King's prerogative and authority: unless " all this can be found, there is no man living can find the Bishops guilty upon this " infor-

“ information.” Mr. *Somers* trod the same track, and urged, that “ the paper could not possibly stir up sedition in the minds of the people, because it was presented to the King alone; false it could not be, because the matter of it was true: there could be nothing of malice, for the occasion was not sought; the thing was pressed upon them; and a libel it could not be, because the intent was innocent.”

The Attorney-General *Powys* thereon said “ he should not *now* meddle with what the defendants council had offered, because it was not pertinent.” But the Chief Justice *Wright* (no friend to liberty) interposed “ Yes, Mr. Attorney, I’ll tell you what they offer, which it will lie upon you to give an answer to: They would have you shew how this has disturbed the government or diminished the King’s authority.” Mr. Justice *Powell* said “ the *contrivance* and publication are both matters of fact, and upon issue joined the Jurors are Judges of the fact *as it is laid* in the information.” The Solicitor-General *Williams*, without combating what fell from the bench, supported the Attorney thus: “ Under favour, I take it we have made a good case for the King; we have proved what the Bishops have done; and whether this be *warrantable* or not is the question, gentlemen, that *you* are to try.” Serjeant *Baldock* of the same side argued in the same strain. “ The King’s declaration
“ is

“ is said in the petition to be illegal, which
 “ is a charge upon the King in commanding
 “ the Bishops to publish it. Their Lord-
 “ ships say they cannot in honour, consci-
 “ ence, or prudence publish it, which is a re-
 “ flection upon the prudence, justice, and
 “ honour of the King: And this petition ap-
 “ pearing to have been delivered to the
 “ King by the Bishops, persons to whom
 “ we owe a deference as our spiritual mas-
 “ ters, and therefore it having an universal
 “ influence upon all the people, I shall
 “ leave it here to your Lordship *and the jury*,
 “ whether their Lordships ought not to an-
 “ swer for it.” The Chief Justice pre-
 faced his own summing up with saying “ it
 “ is not to be expected I should repeat all
 “ the speeches or the particular facts, but I
 “ will put the Jury in mind of the *most*
 “ *material* things,” and then recapitulated
 the proofs of the King’s declarations, and the
 Bishops petition, and of their delivery and
 publication of it. After which his Lordship
 stated the arguments of the defendants coun-
 cil against a dispensing power in the crown,
 and said “ the truth of it is, the dispensing
 “ power is out of the case. The only ques-
 “ tion before me is, and so it is before you,
 “ gentlemen, it being a question of fact,
 “ whether here be a certain proof of a pub-
 “ lication? and then the next question is a
 “ question of law indeed, whether, if there
 “ be a publication proved, it be a libel?
 “ Gentlemen, upon this point of the publi-
 “ cation

“ cation I have summed up all the evidence
 “ to you, and if you believe then the peti-
 “ tion which these Lords presented to the
 “ King was this petition, truly I think that is
 “ a publication sufficient; and if you do be-
 “ lieve this to be the petition then *we* must
 “ come to enquire whether this be a libel.
 “ Now, *gentlemen*, any thing that shall disturb
 “ the government, or make mischief and a stir
 “ among the people is certainly within the
 “ case *de libellis famosis**; and I must in short
 “ give *you* my opinion, I do take it to be a libel.
 “ Now this being a point of law, if my bro-
 “ thers have any thing to say to it, I suppose
 “ they will deliver their opinions.” Mr. Jus-
 “ tice *Holloway*, “ The question is whether
 “ this petition be a libel or no. *Gentlemen*,
 “ the end and *intent* of every action is to be
 “ considered, and likewise in this case *we* are
 “ to consider the nature of the offence that
 C “ these

* Mr. Barrington, no great favourer of democratic power,
 takes notice that “ we do not find much in the year-books,
 “ or other reporters with regard to this offence, till the great
 “ case entitled *Kal' εξοχνη* *de libellis famosis* (which is the
 “ foundation of what has since been considered as law with
 “ respect to libels); this was determined in the third year of
 “ *James* the first. Every one of the rules there laid down, is
 “ borrowed from the *civil law*, some of which seem either to
 “ be extra-judicial, or not to be maintained, and one of
 “ which (that it does not signify whether the libel be true or
 “ not) Lord *Coke* himself contradicted upon another occasion.
 “ His Lordship plumed himself upon having introduced the
 “ rule that a libel on the dead is punishable, and yet it is
 “ quaintly said that *if the dead person libelled is a magistrate, it*
 “ *is a reflection on government which never dies*. Libels cannot
 “ be too much discouraged. Nor is such restraint wanting
 “ by the *common law*, if the principles laid down in this
 “ *Star-chamber* decision are not resorted to.” *Observations on*
antient statutes, p. 82, 83, 84.

“ noble persons are charged with : it is for
 “ delivering a petition, which, according
 “ as they have made their defence, was with
 “ all humility and decency that could be :
 “ so that if there was no ill intent, and
 “ they were not men of evil lives or the like,
 “ to deliver a petition cannot be a fault, it
 “ being the right of the subject to petition.
 “ If *you* are satisfied there was an *ill intention*
 “ of sedition, or the like, you ought to find
 “ them guilty : but if there be nothing in the
 “ case of that kind, I think it is no libel.
 “ *It is left to you, gentlemen ;* but that is my
 “ opinion.” Mr. Justice Powell. “ Truly
 “ I cannot see for my part any thing of se-
 “ dition, or any other crime, fixed upon these
 “ reverend fathers. For, gentlemen, to
 “ make it a libel, it must be false * ; it must
 “ be malicious, and it must tend to sedi-
 “ tion. As to the falsehood, I see nothing
 “ that is offered by the King’s council, nor
 “ any thing as to the malice. Now, *gen-*
 “ *tlemen, the matter of it is before you ; you*
 “ *are to consider of it,* and it is worth your
 “ consideration, &c. If this be once allow-
 “ ed, all the legislature will be in the King,
 “ which is a thing worth considering, and
 “ I leave the issue to God and your con-
 “ sciences.”

(*) That court sycophant, the great Lord Bacon, casts a
 reproach on his enemy Lord Chief Justice Coke, for maintain-
 ing the contrary doctrine. “ The position that it is not material
 “ *whether the libel be true or false, or whether the person against*
 “ *whom it is made be of good or ill fame,* is a proscription of
 “ truth and the provision of a sanctuary for weak and wicked
 “ men, who may be employed as Ministers or Judges.” Ba-
 con’s Letters.

“ sciences. Mr. Justice *Allybone* (a Roman
 Catholic). “ The single question is whether
 “ this petition shall be in construction of
 “ law, a libel in itself, or a thing of great
 “ innocence. No man can take upon him
 “ to write against the actual exercise of go-
 “ vernment, unless he have leave from the
 “ government, but he makes a libel, be
 “ what he writes true or false. So that
 “ this I say is a libel. No private man
 “ can take upon him to write concerning the
 “ government at all. When I intrude my-
 “ self into other mens business, I am a li-
 “ beller. Whether it be in the form of a
 “ supplication, address, or petition, it is a
 “ libel. Then, *gentlemen*, consider what
 “ this petition is. This is a petition re-
 “ lating to something that was done and or-
 “ dered by the government. By this rule
 “ may every act of the government be shaken.
 “ We are not to measure things from any
 “ truth they have in themselves, but from
 “ the aspect they have upon the govern-
 “ ment; for, there may be every tittle of a
 “ libel true, and yet it may be a libel still :
 “ So that I put no great stress upon that ob-
 “ jection, that the matter of it is not false ;
 “ and, for sedition, it is that which every
 “ libel carries in itself ; and as every trespass
 “ implies *vi et armis*, so every libel against
 “ the government carries in it sedition, and
 “ all the other epithets that are in the infor-
 “ mation.” The Jury being asked, after a
 whole night’s consideration, whether they

found the defendants guilty of the misdemeanor whereof they were impeached, or not guilty, said not guilty, which occasioned a shout; and one of the shouters being seized, the Chief Justice said to him, “ I am as glad
 “ as you can be that my Lords the Bishops
 “ are acquitted, but your manner of rejoicing is indecent*.”

The only excuse, which I can make, for thus fully laying the arguments of the last case before the reader, is its being the most famous trial extant, attended by the ablest council of the kingdom, and before a full court. It happened at the very close of the reign of *James the Second*, who interested himself greatly in the prosecution, and obliged the president of his council to become a witness upon it. In short, the very existence of the Jacobite government in this country, depended upon the event. Yet in this trial, although the Judges differed whether the malicious intention in libel were a point of law or a matter of fact, they all concurred in declaring the Jury were judges thereof, and in leaving it accordingly to them; and no one of the eminent council even *hinted* the contrary, excepting *Powys*, and he very slightly. What can be more decisive, what can be more notorious? It moves my wonder therefore, in the utmost degree, to read the following extraordinary passages in the late judgment in the *King against Woodfall*.
 “ If the jury meant to say they did not find
 “ the

* See *State Trials*, 4th Vol.

“ the paper a libel, or the intent of the
 “ defendant to be criminal in publishing it,
 “ or that they did not find the truth and
 “ application of the epithets in the in-
 “ formation, *all this would have vitiated*
 “ *the verdict*; for it would have been en-
 “ tering into matters not before them?
 “ We are all of opinion that Lord *Mans-*
 “ *field's* direction to the Jury was right and
 “ according to law; the positions contained
 “ in it *never were doubted*. Upon trials for
 “ libels where his direction has been uni-
 “ formly the same, the bar may remember
 “ the dead, and the living (who are absent)
 “ all to have concurred in agreeing that it
 “ was law thus to direct the Jury in matter
 “ of libel.” May not Juries now under
 George the *Third*, take upon themselves to do
 what the Judges of *James the Second*, not
 only permitted but told them was their
 right? Is the celebrated power of an English
 Jury really so sunk, or has the *British* Chief
 Justice *done wrong* in telling them it was?
 The question is important and deserves an
 answer at the bar of parliament.

But to return to the dogmas of this me-
 morable judgment. If the Jury (as is there
 asserted) have nothing to do with the intent,
 how, in strictness, can “ their general ver-
 “ dict of guilty *find* what the *law only* im-
 “ plies, from the fact?” For “ if the law
 “ implies, from the fact of publication, a
 “ criminal intent,” so soon as the Jury have
 found such fact, the court will be *bound* to
 pro-

pronounce the publication a libel, and cannot enter into any subsequent consideration of it nor arrest judgment, although they should think it no libel. Nevertheless this last power is expressly contended for by this very court in the same judgment.

I can, I protest, neither reconcile these positions together, nor with truth or law, and do, therefore, with great humility, conceive the direction to have been wrong; and I question much, whether any instance can be given, of the clerk's entering a verdict of *guilty*, upon a finding of *printing and publishing*, except in the late case of *Williams*; nor do I know, how such clerk could vindicate such entry, if called upon. I take it to have been illegal. Judge *Allybone* did not go so far, and yet there is a remarkable similitude between his reasoning and positions, and the *British* Chief's. *Jefferies*, King *James* the Second's law peer, (I believe) came near the mark, not quite up to it, never affirming directly, and in so many words, that "by
" professedly judging whether libel or not,
" or of the intent, the Jury would have *vi-*
" *tiated* (that is, rendered null) their ver-
" dict."

The reader must forgive me, if I here break the course of my argument, for the sake of making a reflection or two. I may be mistaken, but it seems to me, by this way of expounding the constitution of this country, as if its life-blood was letting out. For, I am one of those who hold with Dr. *Middleton*,

dleton, that “ the press, in all countries,
 “ where it can have its free course, will ever
 “ be found the surest guardian of right and
 “ truth, and that *he* must be allowed to act
 “ like a generous adversary, who refers the
 “ merit of his argument to that trial.” Nor
 is what old *Donne* the divine says unworthy
 attention. “ There may be many cases, where
 “ a man may do his country good, and ser-
 “ vice by libelling; for, where a man is
 “ either too great, or his vices too general
 “ to be brought under a judiciary accusation,
 “ there is no way but the extraordinary
 “ method of accusation. Sealed letters,
 “ in the Star-chamber have, now-a-days,
 “ been judged libels.” In truth, the free-
 dom of this country from hierarchical and
 monarchical tyranny, is greatly owing to a
 free press. The little liberty which *France*
 is now getting into, both in civil and reli-
 gious concerns, may be wholly attributed to
 the same cause. It is the bulwark of the fran-
 chises of the people, who would never know
 what was doing, nor see the consequences,
 were it not for the press. The liberty of it in
 England, however, seems to me to be now
 in the utmost danger; and I will tell you how.
 By this late adjudication, (according to the
 printed relation) Juries, in matter of libel,
 are not to judge of the intent of the writing,
 and if they declare they have done so, it will
 annul their verdict. Consequently, the Court
 alone can, and must determine, whether the
 defendant has been guilty of any crime. The
 Jury

Jury have nothing to do with it. They can only find, whether the defendant published the paper, and whether any occasional blank in it, as for example K—g, is rightly filled up in the information, and means *King*. Now the Attorney-General is an officer during pleasure, not upon oath, and has the power of filing an information against whom he pleases, and of putting him upon his trial. The writer of this, or any other paper, controverting by argument any decision of law, or act of administration, may become an object of their resentment. What he says may be true, and of the last consequence to the public; but being against the Ministry, and deeply affecting their power and interest, it may be deemed proper to endeavour at a condemnation of it by a Court of Justice, in order to punish the writer, and to prevent the like for the future. The Chief Justice of the King's Bench, for the time being, may chance to be a courtier, of a Jacobite family, and to have arbitrary notions with respect to government. He may hold, besides his judicial office, another during pleasure, that may bring him in 4 or 5000l. a year; the next Judge to him may hold likewise an additional, precarious place, of 2000l. a year, by the recommendation of his Chief; the third Judge may have lately had given him, through the same interest, a place of 300l. a year; and the fourth and last, may be a modest young man, just brought to the Bench, from being a private coun-

council, in a laborious department in the profession, wholly and solely by the authority of the same Chief. His Lordship being a political man, may be asked by the Ministry of the day, whether he has read such a pamphlet, and whether he does not think it a strong libel upon them? He may answer yes : upon which Mr. Attorney is directed to prosecute the writer. This is done, and he is taken up, and required to find sureties of the peace, and for his behaviour, and not merely for his appearance to try the information. He must submit to all this, or lie in prison *ab initio*. It matters not whether he be one of the Representatives of the people in Parliament or not, for by a late concurrent resolution of both houses, he is intitled to no privilege in the case of a libel, although he is in every other misdemeanor which is not an actual breach of the peace. When the trial comes on, the Jury find the defendant not guilty. The Judge tells them the evidence was clear of his being the publisher, and desires to know the ground they go upon. They tell his Lordship that they do not think the paper a libel, or published with a criminal, but with a good intent. He acquaints them that their verdict then is a nullity : in short, it is no verdict. After some pause and confusion, they say, at last, they cannot, to be sure, but find that the defendant published the paper. A verdict of guilty is ordered to be entered up. The council move in arrest of judgment, on account of the misdirection

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of

of the Judge. The only Court, where this motion can be heard, is his Lordship's own Court, so circumstanced it being the only tribunal where criminal prosecutions at the suit of the King against the subject can be heard. I need say no more; but I will suppose his Lordship directs a special verdict to be taken: it must, in that way, come again before himself and his assessors. From thence it may, indeed, be carried before the House of Lords by appeal, but if the Ministry have any weight there, I leave it to the reader to guess what a writer against them, appealing from a solemn judgment of the Judges of the land, is likely to meet with. The King's-Bench may sentence such writer to perpetual imprisonment, or to a fine which he cannot pay, which will answer the same end, or to the pillory; and this may even be the fate of a Peer. Who, knowing all this, and seeing such an example, would ever think of laying his thoughts before the public, in opposition to any measure of administration or government? Until now, the common notion of this constitution was, that no person under it could be found guilty of any *crime* but by a Jury. If law was mixed with fact, the Judge always instructed the Jury what he apprehended to be the law, and they, after comparing the facts with his exposition of the law, were to judge whether the defendant was guilty of the crime he was charged with or not, and to find accordingly. No man before ever doubted,

doubted but the Jury in a criminal suit were the sole judges of the criminality of the defendant. But that is found, at last, not to be so in libel, and that the Jury are merely to find whether the defendant published. It is the King's Judge who must pronounce him guilty or not of the crime alleged. At present, nothing of this sort is likely to fall out; but under the law as said to be settled, it may be the case, and who can tell how soon. The *Jacobite* Judge, *Allybone*, laid it down that "no private man can take upon him to write against the actual exercise of government, without leave, but he makes a libel;" and, if the present doctrine is to be established, I think one may say, that the Judges of the King's-Bench will really be the state-licensors of the press, and their Court the license-office. *Without leave* from thence, who dare write freely? No man can put himself upon his country, and submit it to the judgment of a Jury, whether he has been guilty or not of a crime in writing what proved upon him. Their taking that into their consideration would be of no avail: were they even to declare that they found a defendant *not guilty* on the consideration of the intent of the writing, it would destroy the effect of their verdict, vitiate and annul it. The Court arrogates that power to itself alone: is not this, in effect, establishing under another name, a state-licensor of the press? and is that, under any pretence, or through any

medium to be endured? After so grave and momentous a matter, it may be esteemed trifling to mention another novelty, which I apprehend has lately found its way into this Court of universal criminal jurisdiction. I mean the late practice of refusing to let the Attorney-General move for leave to file an information, under the beneficial act of King William, as was done in the case of Dr. *Shebbeare*, but obliging him to file an information *ex officio*. Whether this be settled with a view to lay the Crown under the necessity of always using this odious sort of information, and, by its frequency, to give it an air of being more constitutional, and to sanctify it by a constant user, or for any other reason, I cannot tell. But upon what legal ground such refusal can be warranted, I am incapable of finding out.

Now, to resume again my former thread, and to go on. If “malice is not capable of proof, or such proof is scarcely possible to be produced,” how comes it in trespasses on the person, in murder, &c. to be the principal drift of the prosecutor, to shew circumstances and declarations which evidence malice aforethought and wilfulness? Proof of malice may be either external, by witnesses, &c. or internal, arising out of the nature of the transaction, as in trespass and homicide, or of the writing, as in libel. And men of all ranks, vocations, and education, are equally capable of forming a judgment thereon.

With

With respect to the words of the finding ; if " guilty of printing and publishing is a " general verdict of guilty," how came Lord Chief Justice *Scroggs* to refuse to take such verdict, even in the days of *Charles* the Second, in the *King against Harris*, where the indictment was solely *for causing to be printed and sold*, and the council for the Crown was the then Recorder of *London*, Sir *George Jefferies*. The Jury there found the defendant *guilty of selling the book* ; but the Chief Justice told them, " that was not their business, " they were only to determine whether " barely guilty or not guilty." And Mr. Recorder, rather than be hampered with so insufficient a finding, " would have had them " given their verdict by the poll *." The legal or mental abilities of *Scroggs* and *Jefferies* were never called in question any more than their zeal for the Crown, although their honesty has. On what authority the present *British* Chief Justice outwent them in the *King against Williams*, it may not be very easy to say. There is such a verse somewhere as

" None but himself can be his parallel."

I do not conceive how it can be maintained, that " there is no other charge in the information but printing and publishing," when it is allowed, that the publication is there charged to have been *malicious, seditious, and false, against the peace of the King, his Crown*

* See *State Trials*, Vol. II. p. 1035.

Crown and dignity. The affirming “ that all
“ the epithets † inserted in the information,
“ are formal inferences of law” does not
strip these words of their meaning.

For the foregoing reason, it is begging
the question to say “ the fact found by
“ *printing and publishing only*, is the single
“ question the Jury had to try, or that it
“ was all of which they were to find the
“ defendant guilty, being the sole crime with
“ which he was charged ;” because, if ma-
lice were charged, *that* was another and a
distinct question which they had to try. The
inference, therefore, that *there can be no judg-
ment of acquittal* for that reason upon such
verdict, is neither *clear* nor true.

There seems, likewise, to be something
repugnant or clashing in what is said upon
this head. For if the Jury, by finding the
defendant guilty of *printing and publishing only*,
found all that they were to find, the only
crime charged, and the sole question which
they had to try, how can the word *only*, or
any thing else, arrest judgment, and create
a doubt (a doubt of what?) If there be but
one question, one crime, contained in the
information, the word *only* must refer there-
to ; it can refer to nothing else, it cannot
refer to what is out of the record, and not
before the Court. I vow to God, this sort
of

† *Inserted* is equivalent to *charged*, and the latter word has
been used by the same Justiciary in some of his former
speeches, of these identical epithets.

of reasoning passes my understanding. Truth is never thus at war with itself.

In *Owen*, the bookseller's trial for a libel, *Ryder* the Attorney, and *Murray* the Solicitor-General, being of Council for the Crown, and Lord Chief Justice *Lee* the Judge, it is said that the Jury at first brought in their verdict *guilty of printing and publishing only*. His Lordship, a plain downright lawyer, refused to take the verdict, saying they must either find the defendant generally guilty or not guilty, or else they must find a special verdict. Whereupon the Jury found the defendant not guilty. It would be mispending time to relate the well known and thoroughly agitated case of *Penn and Mead*, or the doctrine of *Buskel's* case.

I am equally at a loss to comprehend why the Jury by "saying that they did not find" the meaning put upon the paper by the "innuendoes would contradict the former" part of their verdict." Surely there is no apparent inconsistency in their believing the defendant to have printed and published the *Public Advertiser* (as we all saw and read it) with blanks, and not believing the filling up of these blanks by the prosecutor to be just, and according to the intention of the author. One may be true, the other false. The proving of the one is not proving the other. They are distinct questions. But the Jury might believe both the one and the other, and not believe the paper for all that to be a malicious and seditious libel. They are three
separate

separate considerations ; and all the nonsense, confusion, and difficulty which have sprung out of this matter, may be placed either to the folly and absurdity of considering them as inseparably united, or of denying that they all make constituent parts of the information, and are consequently before the Jury and to be judged of by them.

In this light, which I take to be the true one, there is no doubt but the verdict in question was an acquittal, as it found nothing but publication and expressly excluded the other charges.

As to the admissibility of affidavits ; I take the rule to be that none can be received either to explain, deny, or controul any thing that passed at the trial, or has been the subject-matter of enquiry and examination, before the Jury. They can only be admitted to something extraneous, or (in the language of lawyers) *debors* the trial.

With regard to *Woodfall* himself : the decreeing of a new trial (or a *venire facias de novo*) is a giving up of the matter, without doubt ; more especially when accompanied with the Attorney-General's *gravely* declaring that he was afraid another trial could not now be had, because the original paper (or *Public Advertiser*) had been delivered to the Jurors and never returned, together with the Chief Justice's *solemn* response and reflection, that " nothing of that kind could vary the rule of Justice." But, I care not one farthing for the particular defendant ; it is the precedent

precedent which I dread, and the expiring liberty of the press that calls for the attention and commiseration of all *Englishmen*. The consequence, doubtless, to Woodfall himself, is much the same as if this singular, anomalous finding of the Jury had been adjudged an acquittal. But it is not the same to posterity. And, to be frank, I do not much like the modern method of controlling or correcting Juries by resorting upon every flimsy occasion to a new trial. And yet I have heard a certain Chief Justice, at his first entrance upon judicature, roundly declare that "the trial by Jury was a very bad
 " sort of trial, and would be the worst of
 " all, were it not for the controlling power
 " of Judges by the granting of new trials.
 " It might have been well enough suited to
 " the old feudal times, but was not at all
 " adapted to the present state of things." And I know very well that in *Scotland* no Jury takes place in civil concerns. Nevertheless I cannot forget that when this doctrine, in disparagement of Juries, was cited in the Common Pleas by a gentle Serjeant, for the purpose of more easily obtaining a new trial, Lord Chief Justice *Pratt* very shortly said, "Why do you cite such cases
 " before me; I was bred up in other prin-
 " ciples, and am now too old to change
 " them."

From the best exercise of my own reason upon the allowed principles of our law, I was sure in the first place, if council did
 E their

their duty, that no conviction could possibly be extracted from the late verdict. And, secondly, as I have ever understood that a Jury cannot, without violence to the constitution, be excluded from judging the intention of a libeller's act any more than from judging the homicide's, so I was and am still clearly of opinion that the verdict in the *King against Woodfall*, if received, was a verdict of acquittal. Indeed, I am now absolutely convinced. For, if the present grand justiciary has not been able to support the contrary positions, either to the satisfaction of the bar or mankind, nobody else either can or ever will.

*Si Pergama dextrâ
Defendi possent, etiam hæc defensa fuissent.*

It must truly be a desperate cause that he cannot colorably maintain at least. And yet to speak honestly the truth, I have never met with any judgment, which in the opinion of sober men has given less satisfaction. There is an indeterminateness (I will not say fallacy) in the expression, a duplicity of sense, and a subtlety of argument, which confound, but do not convince. However, it is neither to my purpose, nor in my inclination, to question the assumed facts, nor to lay open the ambiguities and generalities which the coffee-house lawyers are daily descanting upon. Although I think what has been four months in fabricating might be dis-
jointed

jointed in half an hour. I wish with all my heart I could regard the close of this sorry affair as an indirect *palinodia* of the damnable doctrine and position that jurors are not, in criminal suits, after hearing the opinion of the Bench, to be Judges of the intention, that is, of the criminality of the deed; but to my infinite concern, I think it the very reverse, a deliberate composition to overturn the right of all jurors, and to strip them of their immemorial franchise and inheritance, the very bulwark of their and our personal liberty. Any unascertainable distinctions between acts indifferent and unlawful, and betwixt facts of publication, justifiable or excusable, lawful, innocent, or criminal, if any such were originally delivered, or may have since been foisted in dency and effects which I have suggested. The ignorant may be puzzled or circumvented, but the sagacious and discerning cannot be thus purblind. And to time, discussion, and occasion, I leave the redress and remedy, hoping that those, who are able and prompt to resent the distant attack of a foreign enemy, upon a contemptible outlying possession, will not suffer one of the main pillars of our domestic constitution to be sapped and undermined before our faces at home. Let us, in short, all unite in defence of our antient policy, the trial by jury, and cry out in the words of Father Paul,

Esto perpetua.

—uno avulso
Non deficit alter aureus.—

November 28, 1770,

AFTER writing the above, word was brought to me that in the *King against Almon*, the defendant had received sentence in the Kings Bench to pay 10 marks, and to be bound himself in a recognizance of 400*l.* for his good behaviour for two years, and to find two sureties in 200*l.* a piece, under pain of imprisonment.

The case was, I think, that the servant of the defendant received into his shop some copies of the pamphlet (charged to be a libel) when his master was absent, upon a general presumption that he would willingly promote the sale of the publications of Mr. Miller the editor. Several were soon sold. The defendant, the master, is therefore presumed to have known and authorized this sale, and is *informed* against for it by the attorney general. Nothing to the contrary is proved, although opened by counsel, at the trial; and, upon this presumptive evidence (the admission of which was strenuously opposed) he is, under the direction of the judge, convicted. The judge however declared, that had any evidence been produced to have proved the defendant ignorant of the sale when made, and to have disapproved it so soon as it came to his knowledge, he would have directed the jury to have acquitted him. One *Woodfall*, it seems, originally printed the paper in question in the *Public Advertiser*, from whence it was copied into other

other news-papers, and afterwards collected by *Miller*, and various people, into *monthly Registers and Museums*. *Woodfall* and *Miller* are prosecuted for their publications, and both acquitted. When *Almon* is brought up for judgment, it appears by affidavits from him, *Miller* &c. that he, the defendant *Almon*, was from home when the copies were brought to his shop and some of them sold, and that at his return he forthwith looked into the publication, and seeing it a dangerous one, ordered the sale to be stopt, and his servant to carry back the remainder.* These affidavits are un-

* From Lloyd's Chronicle, Nov. 30, 1770.

Substance of what passed in Westminster-Hall yesterday (Nov. 28) when Mr. ALMON received sentence for selling Number I. of the London Museum, containing Junius's Letter to the K—.

ABOUT two o'clock Mr. Almon was brought into the Court of King's Bench. Lord Mansfield told the Court there were six affidavits which were strong in alienating the criminality, and extenuating the degree of guilt in the defendant; and it was necessary they should be read in open Court. The two first by Mr. Miller, printer, deposing that he is the printer, publisher, and principal proprietor of the London Museum; that he inserted therein the letter of Junius, without the privity, consent or knowledge of Mr. Almon, or any kind of communication with him; that he put Mr. Almon's name upon the blue cover of the work, in like manner, without his privity, consent or knowledge; that Mr. Almon, as soon as he discovered his name at the foot of the wrapper, immediately sent Mr. Miller a note, expressing his dislike, and desiring that it might not appear there in future; this note was accidentally destroyed, as Mr. Miller did not conceive it would ever be of consequence enough to be preserved. The third affidavit was made by the defendant himself, who declared, that he was not at home when the London Museums came into his shop; that as soon as he came in, which was in the afternoon of Jan. 1, he observed his name at the bottom of the cover, and immediately sent a note to Mr. Miller, expressing his disapprobation of it; and the first

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time

controverted, uncontradicted, and unimpeached, and comprize the very evidence

time in the same day that he had leisure, he perused the monthly publications, and directly gave orders to stop the sale of such as contained Junius's letter; among others was the London Museum; the number sent him by Mr. Miller was 300, and about 67 or 68 were sold before he ordered the sale to be stopt; the next morning he ordered what remained to be carried up to his garret, and the earliest opportunity returned them to Mr. Miller. The fourth affidavit was the deposition of Mr. Dilly, bookseller, proving, that it was the customary practice of the trade to affix, in the title page of any book or pamphlet, the names of such booksellers, who, from the conveniency of their situation, or the reputation of their trade, might tend most to encrease the sale. The fifth affidavit was made by Robert Morris, Esq; of Lincoln's-Inn, barrister, who deposed, that he had called at Mr. Almon's a day or two after the publication of the London Museum, and asked him for it; but Mr. Almon answered him he had it not; this deponent further declared, that while he was in the shop a stranger also came in to buy one, but was refused it in the same manner; that he had himself since bought it elsewhere, had perused it, and conceived it was no libel. The sixth affidavit was made by — Adams, shopman to Mr. Almon, who fully corroborated and strengthened what his master had previously deposed.

The Attorney General opened with declaring, that had not the defendant produced the six affidavits, he should have been extremely urgent with the Court for as severe a punishment as could be inflicted, as he considered the offence Mr. Almon was convicted of, as one of the most heinous that could possibly be imagined; that, as far as his ideas carried him, a publisher was not at all less criminal because he was not the original publisher; in his mind he was infinitely more so, the author, as the founder of the mischief, had the greatest guilt; the person who first printed it, without having heard any opinion but his own, was not near so criminal as he who, after the general idea of the public was known concerning it, gave it to the world a second, a third, or a tenth time; all that remained now for him was to point out such objections as arose in his breast, tending to lessen the effect of the affidavits in alienating the criminality of the defendant: he observed first, that
what

which Lord Mansfield proclaimed at the trial, had it then been produced, would have acquit-

what Mr. Miller had deposed might have been given as evidence on the trial, that deponent having been then called, if not sworn, but was prevented from examination by the Counsel for Mr. Almon; that in that case, he and his brethren would have been afforded an opportunity of cross-examining the witnesses, and have put such questions to them as might have lessened the weight of what they advanced.—Lord Mansfield here desired to set the Attorney General right, informing him that the affidavits were not now received as impeaching or invalidating the recorded verdict; if they had been offered in that light, the Court could not have heard them; that the Counsel for the defendant had wisely stopped the evidence on their side from being examined, thereby preventing any thing coming out that might injure their client; that the affidavits now were merely to lessen and fix the degree of punishment the defendant merited; and, therefore, the Attorney General went upon wrong grounds in considering them as evidence for Mr. Almon. The Attorney General next urged, the want of preciseness in the affidavits, particularly in that of the defendant, which, he said, did not point out the difference of time between his sending the letter to Mr. Miller, and stopping the sale of the pamphlet, and was curiously defining the inaccuracy, when Judge Aston interrupted him with observing, that that was rather a nice argument; that the Court understood, and he dared say Mr. Almon meant it, in the afternoon of the day of the publication; that if it was any way equivocal, the matter was direct perjury.—The Attorney General declared, he did not mean by nice, or subtle arguments, to hurt any man, but went upon the honest grounds the affidavit afforded; that as it was wholly in the defendant's power to produce all he could in favour of himself, he only wondered he had not been more full and conclusive, reciting the tenor of the affidavit in words rather more expressive and concise than Almon's: he said, he was more particularly urgent upon this occasion, that too great a precedent might not be opened for delinquents to evade punishment, by lessening and impeaching the verdict when brought to receive judgment, and that it might not be laid down as a rule of the Court, to afford a shelter for criminals to escape under, upon a plea of ignorance, or of a libel being sold inadvertently without

*See the report
of Almon's
Case in 4.
Burr.*

ted the defendant. And it is immaterial now whether the non-production of it at that time

the knowledge of the vender : [Lord Mansfield informed him, he need not be under apprehensions that any such rule would be laid down by that Court ; and then asked the Counsel for the Crown, if they had any affidavits to produce on their side ; and being answered in the negative, he informed the Court that he was obliged to leave them, but desired the matter might go on.] The Attorney General next distinguished between a man's selling a pamphlet as long as he could sell, and stopping while he yet had it in his power to sell, calling Mr. Almon's the middle degree of guilt, but yet aggravating, as much as possible, every circumstance that could tell against the defendant, or increase the punishment. The Solicitor General seconded what the Attorney General had just advanced, observing, that Mr. Almon's affidavit was very vague and inconclusive ; that the Court should have been informed where Mr. Almon was when from home, why he went from home, whether into the country, or to what place, the business that detained him, and the precise time he staid ; that Mr. Almon had wrote to Miller about his name, why he did not also then return the books ? The same cover in which his name was printed, expressed the contents of the pamphlet, at the head of which stood Junius's letter to the K— : Could he not see that ? But he sold 67, and then stopped, when, as his affidavit said, he looked over the monthly publications. It was not therefore unknowingly, or against Mr. Almon's will, to sell what he knew to be a criminal paper ; but it was the fear of punishment alone that induced him to stop the sale ; Mr. Almon had, on his trial, been legally convicted of selling a libel of the most infamous kind ; the affidavits produced were with him of no weight, they were extraneous to the verdict, nor should they at all affect the punishment.—Mr. Moreton got up, as third Counsel for the Crown, spoke a few words, which scarce any body heard, and then sat down again ; when Serjeant Glynn arose, and began with observing, that what his learned brethren had said, as to the affidavits now produced not impeaching or lessening the verdict, they were certainly right ; the verdict of a jury was solemn, and ought to be considered as a sacred finding ; in consequence of the verdict, he was under the necessity of considering Mr. Almon as in some measure guilty, but it was but right the guilt should be regarded only in its just and proper degree ; Mr. Almon's

happened from accident, negligence, or misapprehension of council. It certainly existed and

mon's, in his opinion, was almost merely nominal, and was indeed, with all due deference to the verdict, next to nothing; the affidavits were strong, and ought to lessen the idea of criminality the verdict necessarily involved the defendant in; the Attorney General might indeed have drawn them up with more accuracy; Mr. Almon, as an honest man, (a character in which he had never been impeached) had only given the necessary strong lights, which he had not done altogether without the assistance of the Attorney General; for it was in consequence of the objections made by that gentleman, when Mr. Almon was brought up for judgment last term, that the affidavits bore their present face; the Bench, as well as the Bar, had pointed it out as necessary, that it should be ascertained when Mr. Almon stopped the sale, how many he sold, and when they were returned; these questions were now answered; that as to the "Where was he? What did he? and, When returned he?" so loudly and strenuously called for by the learned Solicitor General, they were not necessary to the point, nor were they before demanded; Mr. Almon, of all the publishers of this paper, many avowedly so, stood alone likely to receive punishment, and certainly with the slightest degree of criminality; his crime was merely nominal; and his punishment, if any, should be merely nominal; the affidavits might be called extraneous from the verdict, but they were, of the kind, of weight and consequence sufficient to alleviate, and almost wholly exculpate the defendant. As to talking of being induced to do right through fear of punishment, it was an argument that might, with equal propriety, be alledged against every man, for every good and just action; a severe punishment was never, under such circumstances, inflicted in that, or any other Court of Legislature, he hoped, therefore, the Court would properly consider the degree of extenuation enforced by the affidavits, and give judgment accordingly.

Mr. Lee spoke next for the defendant; he observed, that if Mr. Almon's affidavits were equivocal or false, they were not only the grossest prejudices, but the grossest insults upon that Court that ever had been offered; but that there did not appear to him the most distant reason to doubt the validity or truth of any of them; the affidavit of Mr. Morris, an independent gentleman, was the most incontrovertible proof of their being founded
on

might have been had. The defendant therefore was always, *foro conscientiae*, innocent, and

on fact that could possibly be produced; and that established, the whole was a strong alleviation of the defendant's criminality; he declared he was amazed to hear the gentlemen of the other side prosecuting this affair with so much ardour; he imagined that Mr. Almon had been all along considered as scarcely at all guilty; that every circumstance told for him; and he hoped the Court would be as lenient as possible in the punishment.

Judge Aston then began giving judgment, which he prefaced with observing, that Mr. Almon had been found guilty of publishing a most wicked, seditious, and malignant libel; a libel on the person of the King, a Prince remarkable for the excellency of his public conduct, his private and religious virtues, and his steady attention to the welfare of his people; as admirable in himself as his Libeller was despicable; notwithstanding the opinion of one Morris, the defendant had been fully, fairly, and legally convicted of selling, in the London Museum, a libel filled with defamation and falshood, abusive of the Sovereign, and the great officers of state, charging both Houses of Parliament with adopting arbitrary measures to the injury of the public, and, in contempt to the laws, tending to disturb the public peace, to destroy order, and create anarchy and confusion; the crime deserved the severest punishment that could possibly be inflicted; but the King wanted not to oppress his subjects with cruelty, he meant only to correct their ill-sprung errors. The Court were of opinion the affidavits of Mr. Miller and Mr. Almon lessened the guilt of the latter; they did not attend to one of the others, as they would not pay any regard to the affidavit of Morris, who could declare (though only in a parenthesis) that Junius's letter was not a libel; but that the booksellers, in future times, might not screen themselves, by pleading ignorance of what they sold, it was necessary to repeat, that the bare fact of publication was sufficient conviction. The Court conceived, that the affidavits were not designedly equivocal; if they were, the defendant must know he was guilty of perjury: and notwithstanding what had been said by gentlemen of the other side, Judge Aston declared he could not help defending the Attorney General for pushing his prayer for judgment in this cause. Had he done otherwise, he would have neglected the duties of his office, a matter he had never yet been guilty of. The
sentence

this was known to the court, when, in consequence of his actual conviction, they were obliged to pass formally a sentence of condemnation upon him.

is therefore to be inquired, and I should be glad to know how he came to be so severely dealt with. As to the fine, it is not great and shall say nothing to it; although one would think in such case he might and should have been mulcted a barley corn, and then dismissed, with some commiseration for the grievous trouble and heavy expence he had been unfortunately put to. His injury was great enough, by having been tried at all, and much greater by having been found guilty, when innocent. The judges must have felt for him, if they considered the case only before them and looked at nothing else, which I cannot suppose judges ever do. My astonishment therefore is extreme to find him who should have been sentenced was, a fine of ten marks, and to be bound over to his good behaviour for two years, the defendant in 400l. and two sureties in 200l. each.

N. B. Copies of these affidavits were given to the Solicitor of the Treasury last Trinity Term, before the long vacation, and three of them had been read in Court. After this second reading was finished, the Counsel were heard, and then Mr. J. Aston read, from a paper, what the Court thought good to pronounce upon the matter.

The reason given, for throwing out of the consideration, a material affidavit made by Mr. Morris, a witness totally disinterested, is really curious. He is a young barrister, and swears that he bought Junius's letter, *not thinking it a libel*. The Judge thinks it is; and the point upon which these two lawyers differ, is agreed unanimously by the whole Court to be matter of law. Because, therefore, Mr. Morris is wrong in his legal notions, he is not to be credited as to matter of *fact*. How this might sound in the *four Courts*, I know not; but, in my opinion, it will not pass in Westminster Hall for fair inference, good logic, or pure justice.

quitted

quitted and was avowedly free from all crime, adjudged to enter into a very large recognizance for his good behaviour during two years to come, under pain of being imprisoned. This is the sentence of a criminal, who hath dangerously and wilfully broken the peace and violated the rights of society. *Shebbeare* and *Wilkes*, the real authors, convicted on the merits, underwent this sort of judgment. But no reason, no polity, no principle of natural justice, no ground of municipal law, no practice, no precedent, which I ever heard of, will warrant the forcing of a man, innocent by the testimony of the judge who tried him, by the confession of the court that sentenced him, to find the security of a guilty convict for his future good behaviour. His true case was now known, and notoriously such, that had it come out at the trial he must and would have been acquitted upon the spot, through the doctrine and under the direction of Lord *Mansfield*. No surety or recognizance could have then been demanded. What is it that justifies it now? It was to be sure most exceedingly unlucky that his lordship should *happen*, as the newspaper relates it, *to slip out of court but three minutes after* this poor bookseller was called up. It was unfortunate for both. I can only wish now that the record *together with the affidavits and the judges notes of the trial* could some how be brought before or sent for by the lords and undergo a parliamentary review. The defendant would there be sure at least of Lord *Mansfield's* doing him justice.

I cannot account for this proceeding of the *King's Bench* as a court of law, or even suggest to myself a justifiable ground of criminal jurisdiction,

dition, for throwing such painful restraint and severe chains round the birthright of an innocent *Englishman*, during two years of his life. Unless I am misinformed touching the circumstances, there is no *legal* vindication of the measure, and in conscience and equity it is highly unjust. It must therefore be done by this sacred court upon some principle of new police, as a licensing-office for the press. Indeed the disproportionateness of the fine to the recognizance and restraint proves it to be so. It must be in this light that Mr. Almon is laid under a biennial interdiction from the free use of his press, in a word, from printing any paper (in the language of judge *Allybone*) *relative to government at all*, under the penalty of 800 *l.* He who has *fully* exculpated himself is put into this dreadful jeopardy. And who can tell what may be deemed by the King's Bench an infraction of his good behaviour, and a forfeiture of his recognizance? He can neither speak, act, nor write, without fear and danger. If a man, exempt from all crime, convicted through his own or his counsel's inadvertency, or the judge's misdirection, and cleared by subsequent proof, can thus be dealt with, "Justice stands trembling on the edge of law." If this strait waistcoat can be clapped upon him, when justified in open court, what would have been done with him had he been the wilful vender of some impudent abuse, and a real delinquent!

Having said thus much upon this head, let us now enquire how the defendant came ever to be found guilty at all. It is true, if I am rightly instructed, that he produced no witness to prove his innocence, but as true that no

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proof

proof whatever was produced against him personally. He was convicted in a *criminal* court, under the express direction of the chief justice of England, upon presumptive evidence alone, notwithstanding the admissibility of it was objected to. In short, his servant did the criminal act in the defendant's house, and it was therefore presumed to be done by his master's order, and with his privity. Now, although this sort of evidence, which is not the violent, but at most the probable presumption only, may have been held sufficient in *civil* cases to put a defendant upon his defence, it has never before been held so, that I know of, in any *criminal* cause. My Lord Coke * says, in treating of *civil* matters, that the *præsumptio probabilis* weighs but little, and then it must be accompanied with other matter, and is but inducement. The case of *Almon* is, I fancy, the first instance of its ever having been received at all in a criminal suit; and in his case it was the *sole* ground of conviction. The judge directed that it was admissible, it being *primâ facie* evidence, and that *primâ facie* evidence was sufficient in a criminal court to put a defendant upon his defence, and that it was *conclusive* evidence, if no other was opposed to it. And by

* 1 Inst. 6th Book. "Many times juries, together with other matter, are much induced by presumptions, whereof there be three sorts, viz. violent, probable, and light or temerary. *Violenta præsumptio* is many times *plena probatio*, as if one be run thorough the body with a sword in a house, whereof he instantly dies, and a man is seen to come out of that house with a bloody sword, and no other man was at that time in the house. *Præsumptio probabilis* moves little; but *præsumptio levis seu temeraria* moves not at all."

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this means every master is now rendered *criminally* answerable for the act of his servant. I question nevertheless both positions. If any such evidence were ever before received at all (which I somewhat doubt) in a crown cause, I dare say it was merely by way of inducement and illustration of other evidence, and after such other evidence had been layed as a ground for it. I dare venture to say, it was never before the sole evidence upon which any conviction was founded. I never heard before of *primâ facie* evidence in a *crown* court; and to go farther, and to lay it down as *conclusive* evidence there, is utterly inconsistent with all the ideas of law which I have ever imbibed. It is in reality changing the very constitution of courts, and making no difference between civil and criminal law; between a man's making satisfaction out of his purse, for a loss which another has sustained by the act of his servant, and the answering *criminally* to the state in his own person, as an offender to his country, and a wicked man, for what some body in his service has done, without any special order. It is reversing the antient law of England upon this head; and I do not conceive it to be maintainable upon the grounds and principles of the constitution. The consequences, I am sure, will be very extensive, and may be extremely dangerous to all masters, if it be once understood that they may be *criminally* affected by the acts of their servants, who proceed upon general and not upon particular orders, *Civiliter* they may, but *criminaliter* not. The *civilians* definition I know: *conjectura ex certo signo proveniens, quæ, alio non adducto, pro veritate habetur*. But with them the word *certo* meets

with a very strong interpretation. However we are to be governed, as our ancestors once before said, by our own merciful and wise laws, and not by those of the *Roman* emperors. And, for my own part, I deny the admissibility of such evidence before an *English* tribunal of *criminal* pleas.

It is most additionally hard upon the defendant, because he was neither author, printer, re-printer, nor even seller in his own person, but merely an accidental, occasional vender, by the hand of his shopman, in the common course of trade, as a London bookseller, long after the original publication, and before any prosecution had been commenced, or was known to be intended upon it.

Under all these circumstances, this judgment will, I think, be much canvassed. The evidence of original conviction, and the ground for the final sentence, when the innocence of the defendant was established, together with the kind of punishment inflicted, will, in my opinion, deserve the soberest and fullest inquiry, and the most mature reflection, as to the particular justice of the present case, and much more as to the future possible, probable, nay inevitable consequences of such law and such a strain of criminal jurisdiction. The grand inquest of the nation ought to look to it, or the liberty of the press will be totally destroyed, and personal liberty of every kind rendered very precarious.

In libel, the information *charges* the publication to have been made with malice and sedition, against the peace of the realm; the jurors are sworn to the trial of this charge between the king and the defendant, and if they find him guilty, it is recorded that by their verdict he is found

found to have published with malice and sedition, and so they say all *upon their oaths*.

If the jury, who bring in such a verdict, believe the publication not to be malicious and seditious, that is, no libel, they are guilty of perjury, and, were they to avow it, might be punished by attain.

If the judge who tries the cause tells them the trial is not for a libel, that they have nothing to do with the criminality of the paper, and are merely to try the fact of the defendant's having printed and published it, and whether the blanks (if any) stand for such and such words; he misdirects them, contradicts the doctrine and fact of the solemn case of the seven bishops, and gives the lie to the very record itself of the trial. If he permits the defendant to be put upon his defence by presumptive evidence, not from any act of his own, but of his servant, he differs from all judges who have gone before him, and goes counter to the first principles of our constitution. If after such conviction he lets a man, that he himself has declared innocent, to be stripped of that liberty which all other men enjoy, by a sentence of *his* court, in consequence of that conviction, such judge forgets, or abandons the duty of his office, and is the means of oppression and injustice to the subject of England. It is impossible but that a case so circumstanced must cry aloud. It will do so. Even the loud voice of war will not drown it. When the people are ready to fight against their enemies abroad, they will not, I presume, suffer any one impudently to steal from them their liberties at home.

So far from there being any law in the consideration of a libel, a defendant is not permitted
to

to plead any justification, when informed against. He cannot demur to the charge, because the paper criminated is no libel, but must plead guilty or not guilty, and let the whole go to the jury. It is but shuffling and quibbling to call the innuendos, as to the blanks, the "true meaning of the paper" which they are to try: it is but a circumstance from whence, as well as from the whole context, the jury are to judge what is the drift, purport, and true meaning of the paper, that is, whether it be a libel scandalizing the administration of government, and disturbing the peace of the kingdom. In many instances it cannot be determined "upon the face of the record" whether it be a *malicious and seditious* publication: but much evidence of a circumstantial nature, and a knowledge of many facts will be necessary to be known, before that can be ascertained. The "epithets are not formal inferences of law from the printing and publishing." There is no particular set of words which the law has adjudged to constitute a libel, it may be effected by any words. And what is or is not malice, and what is or is not abuse, scandal and defamation, my lord *Mansfield's* hofier, wine-merchant, or brother peer, can as well discern and judge as lord *Mansfield* himself. And the hearing it asserted that "if the jury were to say they did not find the paper a libel, or did not find the epithets, or did not find any express malicious intent, it would not affect the verdict: because none of these things were to be proved or found either way;" nay, the being told all this, would not move me at all. I have read the great trials for state libels, where the first lawyers for parts and rank, have been
counsel

counsel and judges, and I know the contrary. Nevertheless, I am sensible of the artificial purpose for which the word *express* has been thrown into the above declaration, as well as *affect* and *because*, and why it has been given out that “ if the jury were *obliged* to find whether the paper “ was a libel, &c. *then* the direction was “ wrong.” It may upon second thoughts be more discreet to express hypothetically and guardedly what one says upon these ticklish subjects. The case of ship-money teaches a little caution. But, in truth, it comes nearly to the same, whether I declare that “ if the jury did “ not find any *express* malicious intent, it would “ not affect the verdict, *because* it was not to be “ *proved* or found : or that the jury cannot find “ malice, it would vitiate their verdict ; they “ had nothing to do with it, it was not before “ them.” The one is absolute and direct, the other hypothetical and conditional ; the one open and fair, the other crafty and knavish. The like may be observed of the slipperiness and dubiety of the word *meaning*, when it is farther laid down that “ if by *only* they meant “ to say that they did not find the meaning put “ upon the paper by the information, they “ should have acquitted him.” In the day of examination and danger should any come, I see what subterfuges may be had recourse, to and what explanations made use of, by virtue of such expression. But from the context, and from the former application of the word *meaning*, it is plain that it is here used to express only the interpretation of the blanks, *their* meaning and import, and not that of the information. Now, in plain honesty and fair truth, doth not the information mean to charge the
paper

paper with being a libel, is not that its general and main meaning, does it not even expressly do so? *Is not the meaning put upon the paper by the information* that it is a malicious and seditious libel, and is it any more than one circumstance adduced to prove this general meaning, that the several blanks mean such and such words, and that these last allude and refer to such passages of government or transactions, and are to be understood and interpreted of them, &c. &c. &c. ? All the studied artifice of these and many more parts will not affect my deliberate and uninvincible sentiments of the whole matter; in a word, "nothing of that sort will vary the justice of this judgment," by which the liberty of the press is struck at. The aim is so evident, that it is high time to ring out the alarm bell in the ears of all mankind, to hunt down such insidious enemies to every thing that is most dear and valuable to Englishmen, and to root out the grand canker-worm of the state.

F. I. N. I. S.

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